United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1349

To be argued by
RICHARD L. SHANLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1349

GRAND JURY SUBPOENA DUCES TECUM
SERVED UPON
AUTOMATED BREAD DISTRIBUTORS, CORP.,
Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Appellant

BRIEF FOR THE APPELLEE

Events Which Precipitated This Appeal

This matter comes before this Court after a denial of a motion to quash a grand jury subpoena which had been served upon Automated Bread Distributors, Corp. to produce certain records before a Grand Jury sitting in the Eastern District of New York, and to discharge that Grand Jury. The movant in the District Court, Automated Bread Distributors, Corp. is the appellant here. Briefs were filed in the District Court and oral argument took place before District Court Judge Edward R. Neaher, on July 21, 1976. During the course of the argument, Judge Neaher denied the motion to quash and to discharge the Grand Jury. On July 22, 1976, Judge Neaher signed an Order denying the motion and directing the appellant to produce certain records before the Grand Jury on July 28, 1976. Shortly thereafter, the appellant obtained from Judge Neaher a stay of its appearance before the Grand Jury pending appeal from his denial of the motion that appeal is now before this Court.

Issues Presented

I. WHETHER THIS COURT HAS JURISDICTION TO ENTERTAIN AN APPEAL FROM DENIAL OF A MOTION TO QUASH A SUBPOENA DUCES TECUM AND TO DISCHARGE THE GRAND JURY

II. THE CONSTITUTIONALITY OF TITLE 18, UNITED STATES CODE, SECTION 3331

III. WHETHER ALLEGATIONS OF DISCLOSURE OF PROCEEDNGS IN THE GRAND JURY ARE RELEVANT TO THE APPEAL

Statement

On May 27, 1976, a grand jury subpoena duces tecum was served upon Automated Bread Distributors, Corp., the appellant, seeking production of certain books and records of the company, as follows:

> "All records of your company which pertain, refer, or relate to sales by Silvercup Bakers, Inc., and Ranger Bakers, Inc. of private label bread products to Waldbaums, Inc. in which your company participated, including but not limited to: cash receipts ledger, cash disbursements ledger, accounts receivable ledger, accounts payable ledger, cancelled checks, bills and invoices, vouchers, sales discount records, purchase discount records, sales journals, records of advances, and loans to Silvercup Bakers, Inc. and Ranger Bakers, Inc. and supporting subsidiary records for the period January 1, 1973 through December 31, 1974." [App. 20][1]

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[1] "App." refers to Appellant's Appendix.

Appellant thereafter filed a motion to quash the subpoena and to discharge the Grand Jury and also to have an evidentiary hearing as to whether confidential information has been leaked to the press. [App. 3] Appellant's papers included an affidavit by Mr. Mark Jacobson, President of the appellant, which contained allegations of collusion between the Internal Revenue Service and the Brooklyn Strike Force, harassment of the Jacobson family by Governmental agencies, intimidation of customers of the appellant by agents of the Government, and collusion between the Daily News and the Brooklyn Strike Force. The affidavit also accused the Special Attorney of dominating the Grand Jury and abusing its function. [App. 6-19]

The affidavit contained an averment by Mr. Jacobson that a Mr. Bienstock who characterized himself as a Revenue Agent was permitted to examine Automated's records with regard to an audit for the year 1974 and that Mr. Bienstock informed that corporation's accountants that he was satisfied with the audit. [App. 7, ¶4] Mr. Jacobson then alleged that "it now appears that Automated's books and records may have been examined by means of misrepresentations of an IRS Agent acting in concert with the Strike Force." [App. 8 ¶ 6] Mr. Jacobson then alleged that the "subpoena . . . is premature, since the IRS examination may have been unlawful", and that "the Special Attorney has abused his authority. [App. 8, ¶ 6 & 8] Mr. Jacobson then outlined the fact that he was also the President of Ranger Bakers, Inc. which had acquired certain assets of Silvercup Bakers, Inc. on Oct. 29, 1974, pursuant to an Order of the Bankruptcy Court. [App. 9, ¶ 11] He further stated that "Immediately after Ranger acquired Silvercup's assets, our troubles began." [App. 9, ¶ 13] The affiant pointed out that Silvercup's records had been previously subpoenaed, and that a series of articles appeared in the New York Daily News in April, 1975, depicting the affiant's father and

other members of the Jacobson family as members of organized crime. [App. 10, ¶ 15, 16] Mr. Jacobson then stated that the records of Ranger were subpoenaed on May 9, 1975, and a motion to quash that subpoena was denied by Chief Judge Mishler. [App. 10, ¶ 17] Mr. Jacobson then again alleged collusion between Mr. Bienstock and the Strike Force. [App. 10-11, ¶ 18] The affiant then alleged that "It also sent FBI agents to intimidate Ranger's vendors and customers by advising them that Ranger was 'mob-controlled' ", and that "the 'mob' is allegedly my father Samuel Jacobson," who "has been under an intensive and ongoing investigation by law enforcement agencies, including the Strike Force, for at least 10 years." [App. 11, ¶ 20, 21] Mr. Jacobson referred to an article which appeared in the Daily News on May 11, 1975, which alleged that he was set "up as a front for Silvercup Ranger", and his written denial of this allegation and the Daily News alleged refusal to publish the letters or sell his father space to refute the article. [App. 12, ¶ 23, 24] The affiant then referred the District Court to a civil suit instituted by Ranger Bakers and himself against the Daily News and alleged that immediately after he divulged the name of a customer of Ranger's at pre-trial disposition that customer was intimated by an agent of the FBI. [App. 12, ¶ 25, 26] He further stated, "I also understand that FBI agents have intimidated acquaintances of my father subsequent to the commencement of my multi-million dollar suit against the News," that the Daily News was given secret information in violation of Rule 6(e) F.R.CrimP. and concluded that "the Strike Force has used the Daily and Sunday News as a vehicle to disseminate vicious . . . stories about me and the Jacobson family." [App. 12, ¶ 27, 28, 29, 30] Mr. Jacobson further accused the Special Attorney of intimidating via subpoena the large accounts of Ranger Bakers which conveyed "the

message by the Strike Force that it will continue to harass me . . . until I abandon my suit against the News." [App. 14, ¶ 31] The affiant also claimed that the Special Attorney "has abused the power of the subpoena" and "has subverted the clear function of the Grand Jury." [App. 14, ¶ 32] Mr. Jacobson also referred the District Court of the suit instituted by himself and Ranger Bakers against the IRS and the Strike Force which was dismissed by Judge Neaher [App. 16, ¶ 34, 35]. He then accused the Special Attorney of delaying the investigation "solely for the purpose of keeping pressure on the Jacobsons and harassing our business activities" and also of dominating the Grand Jury to the point that "it is unable to fill its historically intended role of standing between the accuser and the accused." [App. 16, ¶ 37, 38] The President of the appellant further alleged that the Grand Jury could not deliberate fairly and that the Jacobson name had gained notoriety outside the Grand Jury. [App. 17, ¶ 39, 40] The affiant also charged that a "further delay in terminating the Grand Jury investigation merely serves to prolong the stigma of being the subject of a criminal inquiry by the Grand Jury." [App. 17, ¶ 40] Mr. Jacobson's concluding allegation was that the subpoena was oppressive. [App. 17, ¶ 41, 42]

The Government submitted an affidavit by the Special Attorney in Charge of the investigation together with a memorandum of law in response to the appellant's motion in the Court below. In his affidavit, the Special Attorney pointed out the scope of the investigation when it commenced, and its complexity, as follows:

"2. That the aforesaid investigation was initiated in May, 1975.

3. That upon information and belief, the investigation encompasses false statements, concealment of facts

and depletion of assets in relation to the bankruptcy of Silvercup Bakers, Inc.; interference with commerce by extortion; acquiring and maintaining control and interest in, and conducting and participating in the conduct of enterprises in interstate commerce, by and through the collection of unlawful debts and patterns of racketeering activity; and conspiracies to commit the above acts.

4. That the investigation is a complex one and of necessity is lengthy." [App. 63, ¶ 2, 3, 4]

The affidavit also stated that the subpoena in question was issued in good faith and that the documents called for were relevant. [App. 64, ¶ 7, 8] The affidavit further stated that the Grand Jury before which the records of the appellant were to be produced was legally convened. [App. 64, ¶ 9] The Special Attorney then denied any collusion between himself and the Internal Revenue Service Audit Division, and stated that he was unaware of any inquiry being made by that entity until July 7, 1976. [App. 64-65, ¶ 10-17] The Special Attorney also denied attempting to intimidate customers of the appellant. [App. 65, ¶ 18] He also denied divulging any secret information to representatives of the Daily News. [App. 65, ¶ 19]

The Special Attorney also labelled as false, the accusations made by Mr. Mark Jacobson in his affidavit that the Special Attorney was abusing the power of the Grand Jury, harassing the Jacobson family and intimidating the accounts of the appellant. [App. 65, ¶ 21] The Special Attorney concluded the affidavit by stating that the investigation was being conducted in good faith. [App. 66, ¶ 23]

On the day before oral argument, the appellant filed a Reply Affirmation challenging the affidavit of the Special Attorney and also alleging further acts of harass-

ment by the Government against the Jacobson family. [App. 67]

Oral argument on the motion took place on July 21, 1976, and Judge Neaher commented at its outset that he had "read your [appellant's] papers from stem to stern, your memorandum of law, and the affidavit and documents attached to it, and some of them I have seen before in connection with earlier documents." [S.M. p. 6][2]

During the course of the argument that appellant unsuccessfully attempted to persuade the District Court to discharge the Grand Jury and quash the subpoena. The hearing concluded with the Court directing that the documents called for in the subpoena as defined during the hearing be produced before the Grand Jury on July 28, 1976. [S.M. p. 52] On July 22, 1976, Judge Neaher formally denied the motions to quash the grand jury subpoena and to discharge the Grand Jury. [Order, 7/22/76]

On September 13, 1976, appellant filed its brief on appeal to this Court. Appellant's brief contains many allegations of harassment by the Strike Force and others.[3]

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[2] "S.M." refers to the stenographic minutes of oral argument on July 21, 1976.

[3] The Government would like to point out that the appellant's Brief categorizes certain statements as facts, that the Government contends should be labelled as allegations of the appellant, or Mr. Mark Jacobson. Indeed, in the District Court, the Government denied all allegations of misconduct, collusion, and other sundry accusations levelled at it by the appellant. For instance, the appellant charges that the Strike Force and others "attack[ed]" the Ranger Bakers and Mark Jacobson [Appellant's Brief, p. 2, 3] Another example of the appellant's loose use of the word "uncontroverted facts" is where he states that "FBI agents visited and intimidated Ranger's vendors and banks". [Appellant's Brief, p.

[Footnote continued on following page]

These allegations are essentially those considered by the District Court.

The appellant is now asking this Court to quash the subpoena and discharge the Grand Jury because the Grand Jury is being used to harass the Jacobson family. [App. Brief, "Point I" p. 7] The appellant also would have this Court declare Title 18, United States Code, Section 3331 unconstitutional [Appellant's Brief, "Point II", p. 15] The appellant also alleges that simultaneous investigations by the Internal Revenue Service and the Strike Force are reason enough to quash the subpoena. [Appellant's Brief, "Point III", p. 23] Finally, the appellant apparently is asking this Court to order an evidentiary hearing in the District Court as to whether the secrecy of the Grand Jury has been violated. [Appellant's Brief, "Point IV", p. 23]

All these claims are frivolous and have no legal validity whatsoever.

11] One further example of what the appellant considers "uncontrovered facts" is the appellation of the IRS as the co-conspirator of the Strike Force. [Appellant's Brief, p 13] The Government does not intend to waste this Court's time by specifically refuting all of the allegations contained in appellant's brief, because they merely are a rehash of all that was alleged in the District Court by the appellant and denied by the Government.

ARGUMENT

POINT I

This Court has no jurisdiction over an appeal from the denial of appellants' motion to quash the subpoena.

The appellant has attempted to convince this Court that there are valid grounds to quash the subpoena, namely, that the subpoena is being used to harass the Jacobson family [Appellant's Brief, "Point I", p. 7], and also that subpoena is being used to obtain evidence against the Appellant in an IRS investigation [Appellant's Brief, "Point III", p. 23].

Both of the above contentions are untrue. But, regardless of the accuracy of those allegations, the Government submits that this Court is without jurisdiction to entertain this appeal.

The Government submits that the two cases cited by appellant in support of its position in "Point I" are not in point. *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) [Appellant's Brief, p. 14] dealt with the legality of a contempt conviction. In that case, the Supreme Court held that an elected official's right to freedom of speech did not present a danger to or jeopardize a grand jury investigation. The case of *United States* v. *Gardner*, 516 F.2d 334, 339 (7th Cir. 1975) [Appellant's Brief, p. 14] involved a post conviction attack on an indictment charging that it should have been dismissed because the Government interfered with the grand jury proceedings. The conviction was affirmed. The *Gardner* case, *supra*, illustrates the approach which can be utilized by a defendant to challenge alleged Governmental tampering

with a grand jury. Nor are the authorities cited by the appellant in support of "POINT III" applicable here. The case *In Re Grand Jury Proceedings*, 486 F.2d 85, 93 (3rd Cir. 1973) [Appellant's Brief, p. 23] dealt with the issue of the necessity of having a hearing during contempt proceedings based upon a failure to comply with a subpoena. The case *In Re Morgan*, 377 F. Supp. 281 (S.D.N.Y. 1974) [Appellant's Brief, p. 24], illustrates that a Government affidavit can be a sufficient basis to deny a motion to quash. The final case cited by appellant, *United States* v. *Doe*, 341 F. Supp. 1350 (S.D.N.Y. 1972) [Appellant's Brief, p. 24] dealt with a Government application for an order allowing IRS agents to peruse grand jury material. This case points out the recognition by the Special Attorney in that case of his obligation of secrecy. Judge Neaher dealt with the appellant's position vis-a-vis that case at oral argument. [S.M. p. 34]

The allegations contained in the appellant's brief were all before the District Court below. Further, appellant would have this Court take these allegations as true. The Government submits that it is neither the function of a Court of Appeals to decide questions of credibility nor to choose between conflicting possible inferences. *United States* v. *Grunewald*, 233 F.2d 556 (2d Cir. 1956) *reversed on other grounds*, 353 U.S. 391.

It would appear that the bulk of the appellant's contentions refer to alleged harm being done to members of the Jacobson family. The Government submits that the Jacobson family has no standing whatsoever in this appeal. Members of the Jacobson family were not parties to the motion below. Consequently, they have no standing to appeal from the District Court's decision. *Ex parte Cockcroft*, 104 U.S. 578 (1881); *United States* v.

McFaddin Express, Inc., et al., 310 F.2d 799 (2d Cir. 1962). Nor can the appellant complain of lower court rulings allegedly affecting the Jacobson family in this Court. *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U.S. 229 (1915).

Title 28, United States Code, Section 1291,[1] requires that an order be final before it can be appealed to a Court of Appeals. Ordinarily, the denial of a motion to quash a subpoena duces tecum is not final and hence not appealable. *United States* v. *Nixon*, 418 U.S. 683 (1974); *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906).

In *United States* v. *Nixon*, *supra*, the Court commented succinctly on the finality requirement of Title 28, United States Code, Section 1291 as it applied to the denial of a motion to quash a subpoena:

> The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. See, e.g., *Cobbledick* v. *United States*, 309 U.S. 323, 324-326, 60 S.Ct. 540, 541-42, 84 L.Ed. 783 (1940). This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation. In applying this

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[1] Title 28, United States Code, Section 1291 reads as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

> principle to an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena duces tecum, it has been repeatedly held that the order is not final and hence not appealable. *United States* v. *Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 1581, 29 L.Ed. 2d 85 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 60 S. Ct. 540, 84 L.Ed. 783 (1940); *Alexander* v. *United States*, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1906). This Court has "consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." *United States* v. *Ryan*, *supra*, at 533 [pp. 690-691]

The Court went on to cite previous Supreme Court decisions pointing out that there are a limited class of exceptions where the purposes underlying the finality rule require a different result:

> The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in *Perlman* v. *United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918), a subpoena had been directed to a third party requesting certain exhibits; the appellant who owned the exhibits, sought to raise a claim of privilege. The Court held an order compelling production was appealable because it was unlikely that the third party would risk a

> contempt citation in order to allow immediate review of the appellant's claim of privilege. Id., at 12-13, 38 S.Ct. at 419-20. That case fell within the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States* v. *Ryan*, *supra*, 402 U.S., at 533, [p. 691]

It would appear that this Court has followed the aforesaid principle in deciding whether or not to entertain appeals from denials of a motion to quash subpoenas duces tecum. *In Re Horowitz*, 482 F.2d 72 (2d Cir. 1973); *In Re Grand Jury Investigation of Violations of 18 U.S.C. Sec. 1621 (perjury)*, 318 F.2d 533 (2d Cir. 1963); *United States* v. *Guterma*, 272 F.2d 344 (2d Cir. 1959)

In the *Horowitz* case, this Court considered whether compliance with a subpoena duces tecum addressed to the appellants' accountant would violate the appellants' right against self-incrimination as well as whether the subpoena was overbroad in the light of the Fourth and Fifth Amendments. Although not expressly stated by this Court, the Government submits that the factual situation presented there was one in which the "denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States* v. *Nixon*, *supra*, p. 691. There the subpoenaed party was a third person, whom one must assume would not risk contempt of court by failing to comply with the subpoena. This Court held in that case that the subpoena was not overbroad and that compliance with the subpoena would not violate any of the appellants' Constitutional rights.

In *United States* v. *Guterma*, *supra*, although the appellant was under indictment, the subpoena was ad-

dressed to a third party. This Court accepted jurisdiction and cited as its authority the same case which the Supreme Court in *United States* v. *Nixon*, *supra* used to enunciate the proposition that there are a limited class of exceptions to the finality rule, namely, *Perlman* v. *United States*, *supra*. [p. 344 fn 1] The issue in *Guterma*, *supra*—was whether compliance with a grand jury subpoena by a third party would violate the appellant's Fifth Amendment rights. In that case, this Court held that the appellant did have a valid Constitutional agreement and quashed the subpoena as to him.

This Court has also refused to accept jurisdiction from a denial of a motion to quash third party subpoenas. *In Re Grand Jury Investigation of Violations of 18 U.S.C., Sec. 1621 (perjury)*, *supra*. In that case this Court reasoned that the appellant, General Motors, had other adequate remedies:

> "The denial of General Motors' motion here will in no way prevent it from asserting in the criminal trial in the Northern District of Illinois, if occasion should arise, that evidence proffered against it has been improperly obtained;" [p. 535]

Assuming the contentions which have been made by the appellant to have some factual basis, the facts of this case do not fit in the class of cases which are appealable. This is not a case where "denial of immediate review would render impossible any review whatsoever". *United States* v. *Nixon*, *supra*, p. 691. Here the appellant is a corporation whose own records were subpoenaed. It has the choice of either complying with the subpoena or risking contempt. If in fact there is a subsequent citation for contempt the validity of the subpoena can be contested at that time.

In light of the aforesaid, we submit that there exists no compelling reason here to depart from the settled rule of Federal appellate practice countenancing against appeals from a denial of a motion to quash a grand jury subpoena, and, accordingly, submit that this Court is without jurisdiction to entertain this appeal. 28 U.S.C. 1291.

POINT II

The decision not to discharge a grand jury is not reviewable on appeal.

Chief Judge Jacob Mishler convened a Special Grand Jury in the Eastern District of New York under the authority of Title 18 United States Code, Sec. 3331 and 3332 in October, 1975, to serve for a period of eighteen months. [Order, 10/6/75] Appellant now asks this Court to discharge the aforementioned Special Grand Jury. Appellant argues in its brief that "It is therefore clear the Judge Mishler was induced to impanel that latest Special Grand Jury on October 6, 1975, upon a bad faith representation of a law enforcement official." [Appellant's Brief, p. 14] The gist of all the allegations is that the Jacobson family, while not parties to this appeal, are being harassed. In effect, appellant is saying that the Special Grand Jury should never have been impanelled and, accordingly, should be discharged. The District Court considered similar contentions and denied the motion to discharge the Special Grand Jury [S.M., p. 29] The Government submits that the denial of that motion is not reviewable on appeal.

Appellant's argument as to alleged harassment of the Jacobson family is not relevant to this appeal. The remedy, if any, for the Jacobson family, may lie elsewhere (i.e., the civil suit referred to in the appellant's brief

and included in its Appendix) but not in this Court at this time. Furthermore, Rule 12(b)(1) F.R.Crim. P. allows a defendant to attack an indictment because of defects in the institution of the prosecution. At that time, allegations of prosecutorial misconduct within the grand jury can be brought to the trial court's attention.

The authorities cited by appellant in support of his contention that "the Grand Jury may be discharged because of an unreasonable delay by the Government in presenting its evidence to the Grand Jury" [Appellant's Brief, p. 21] does not support his position but in fact the position of the Government. The case *In Re Investigation of World Arrangement, etc.*, 107 F. Supp. 628 (D.C. D.C. 1972) dealt with a motion to dismiss a grand jury because many of its members were Federal employees. The Court held that a District Court can discharge a grand jury but declined to do so on those grounds. Appellant also has cited a case which holds that a District Court's discretion not to discharge a Grand Jury cannot be invaded by a Court of Appeals. *In Re Texas Co.*, 201 F.2d 177 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 904. In that case, the Court of Appeals was petitioned to mandamus the District Court which had refused to discharge a grand jury in the *World Arrangement* case, *supra*. The Court of Appeals refused to invade the discretion of the District Court. *Id.* p. 179. The other two cases cited, *United States* v. *Williams*, 378 F. Supp. 61 (D.C. Mo. 1974) and *United States* v. *Daneales*, 370 F. Supp. 1289 (W.D.NY 1974), dealt with motions to dismiss indictments because of inexcusable delay by the Government in presenting evidence to grand juries, which are post indictment motions always available to a defendant under Rule 12(b)(1) F.R.Crim.P.

The Government submits that the authority to convene or discharge a grand jury is vested in the District Court

and is not reviewable on appeal. *Korman* v. *United States*, 486 F.2d 926 (7th Cir. 1973); *Petition of A & H Transportation, Inc., for the Organization of a Special Grand Jury*, 319 F.2d 69 (4th Cir.), *cert. denied*, 375 U.S. 924 (1963). In *Re Texas Co., supra.* In the case of *Korman* v. *United States*, *supra*, the Court dealt with extensions of a special grand jury convened under Title 18, United States Code, Section 3331, and held that the decision of the District Court Judge to extend such a grand jury was not reviewable on appeal. In reaching this conclusion, the Court quoted the *Petition of A & H Transportation, Inc.*, case, *supra*, with approval:

> We are of the opinion as was the Court below that Petition of A & H Transportation Inc., 319 F.2d 69, 71 (4 Cir., 1963), is dispositive of appellants' contention herein challenging the discretion of the District Court. The Court stated in 319 F.2d at page 71:
>
> > 'The authority to convene or discharge a grand jury is vested in the District Court. Its exercise of its discretion to convene, or not to convene a special grand jury, or to discharge a grand jury is not reviewable on appeal, and a Court of appeals cannot by mandamus, or any other extraordinary writ, inject itself into the discretionary area reserved to the District Court."
>
> [6] We therefore hold the initial extension of the Special February 1971 Grand Jury and the subsequent extension on January 10, 1973 were authorized by the statute and within the discretionary powers of the District Court. This is not reviewable on appeal, absent some showing of a flagrant abuse of discretion. No such showing was made or alleged herein. [p. 933]

The Government has been unable to find any published authority contrary to the above holding.

From the cases cited above the rule appears to be that although "flagrant abuse of discretion" may mandate a Court of Appeals' review of a District Court's discretion to extend a grand jury, that Court may not question the District Court's discretion in impanelling or discharging that grand jury. For these reasons, we believe there exists no authority allowing appeal from a denial of a motion to discharge a grand jury, and, accordingly, submit that this Court should decline to entertain this appeal.

POINT III

No valid grounds have been put forward challenging the constitutionality of Title 18, United States Code, Section 3331.

Appellant has challenged the constitutionality of Title 18, United States Code, Section 3331 [Appellant's Brief, pp. 15-22]. He claims that the Constitutional rights of members of the Jacobson family under the Sixth, Eighth, and Fifth Amendments of the Constitution are being violated. As a premise to his argument, the appellant has assumed that a "target" under investigation by a grand jury is "actually on trial". [Appellant's Brief, p. 16] And, he also contends that members of the Jacobson family are "accused persons". [Appellant's Brief, p. 15] Having set forth and expounded upon these contentions, the appellant then concludes that the rights of members of the Jacobson family to a speedy trial, their rights to be free from cruel and unusual punishment, and also their rights not to be deprived of life, liberty, or property without due process of law, have been violated because Section 3331 allows "the impanelling of successive three year Grand Juries." [Appellant's Brief, p. 21]. The appellant's argument is based upon misstatements and misconceptions and is totally invalid.

The Organized Crime Control Act of 1970 of which Section 3331 is a part, has been held to be constitutional. *Korman* v. *United States*, *supra*, p. 954. Notwithstanding the holding in *Korman*, the Government submits that the Constitutional attack to Section 3331 has no valid legal basis. And, a truly compelling reason is self evident, namely that the persons whose Constitutional rights allegedly are being violated are not parties before this Court.

The Sixth Amendment speaks of the rights of the "accused" in a "criminal prosecution". Assuming arguendo that members of the Jacobson family have standing before this Court and further that they are "targets" of the Grand Jury, the Supreme Court has held that a grand jury proceeding is not a "criminal prosecution". *Counselman* v. *Hitchcock*, 142 U.S. 547, 563 (1892). The Government further submits that in no way can the appellant or members of the Jacobson family be considered "accused" persons. *United States* v. *Marion*, 404 U.S. 307 (1971) is dispositive of that contention:

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. [p. 313]
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> * * * * *
>
> Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But, we decline to extend the reach of the amendment to the period prior to arrest. Until

> this even occurs a citizen suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer. [p. 321]

Accordingly, any claim under the Sixth Amendment at this time must at best be labelled premature.

The appellant also claims that the Eighth Amendment of the Constitution prohibits the "impanelling of successive three-year Grand Juries" as "cruel and inhuman punishment" of members of the Jacobson family [Appellant's Brief, p. 21]

This Circuit has considered the "cruel and unusual punishment" clause in the Eighth Amendment in *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033, and has stated "we have considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence" [p. 1032] Furthermore, pre-indictment delay has been held not to reach the level of cruel and inhuman punishment. *United States* v. *McLain*, 501 F.2d 1006 (10th Cir. 1974). In that case, the Court in affirming a fraud conviction, considered a thirty-nine month delay between initiation of an investigation and indictment and held:

> As regards the pre-indictment delay, MacClain's allegation is unsupported. Surely, every person faced with the possibility of criminal charges being filed against him has anxieties. But, this does not approach the extreme type of conditions that must be established to show an Eighth Amendment violation. Moreover, that amendment's purpose is not to require that criminal prosecutions be filed within a certain length of time. Such is the purpose of the applicable statute of limitations. [p. 1013]

Accordingly, this Court need not reach the question of the Constitutionality of the statute under the Eighth Amendment because there are no viable Eighth Amendment contentions before it.

The Appellant's final Constitutional contention deals with alleged violations of the rights of members of the Jacobson family under the Due Process clause. He has cited no authority for the contention that a lengthy grand jury investigation can violate the Fifth Amendment rights of individuals under investigation. And, indeed, the Government has been unable to find any authorities which support this proposition.

This Court is respectfully referred to *Korman* v. *United States, supra.* The Court in that case was faced with the issue of the validity of two contemnor's incarceration for civil contempt before a special grand jury impanelled under Section 3331. The appellants alleged that because Section 3331 allowed for a grand jury to continue in existence for three years rather than the eighteen months allowed for a Rule 6(g) grand jury they were deprived of equal protection under the Due Process clause. The Court found no merit to this argument. Id. p. 933.

The Government submits that the alleged violations of rights under the due process clause in the case at hand cannot compare in magnitude with those alleged in the *Korman* case. A fortiori, therefore, the Government further submits that this Court should find no basis for even considering the appellant's speculative and nebulous contentions.

POINT IV

Improper disclosure of information obtained by a grand jury is not a basis for discharge of the grand jury or for quashing a subpoena.

The appellant finally has alleged that the failure of the District Court to consider or grant an evidentiary hearing with respect to allegations of improper disclosure of information before the Grand Jury was erroneous. [Appellant's Brief, "POINT IV", p. 25] That contention was irrelevant to a motion to quash a subpoena or discharge the Grand Jury. Furthermore, the Government submits that the affidavit of the Special Attorney denying any such disclosure would have been a sufficient basis alone for the denial of such a request. See, *In Re Morgan*, *supra*. Improper disclosure of proceedings before a grand jury can and should be punished; and the correct method of doing so is through contempt proceedings. *United States* v. *Hoffa*, 349 F.2d 20 (6th Cir. 1965), aff'd 385 U.S. 293. The District Court was correct in not directly commenting upon the irrelevant application of the appellant.

The Government submits that this Court need not adjudicate this claim because it was irrelevant to the matter in the District Court.

CONCLUSION

The denial of appellant's motion should be affirmed.

Dated: October 7, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

CHARLES L. WEINTRAUB,
Acting Attorney-in-Charge,
Brooklyn Strike Force,

RICHARD L. SHANLEY,
Special Attorney,
Department of Justice,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF KINGS) ss
EASTERN DISTRICT OF NEW YORK)

LYNN A. KURTZ being duly sworn,

deposes and says that she is employed in the office of the United States Attorney for the Eastern District of New York. - Organized Crime & Racketeering Section.

That on the 8th day of October 19 76 she served ~~a~~ 3 copy of the within

"BRIEF FOR THE APPELLEE"

by placing the same in a properly postpaid franked envelope addressed to:

Irving Mandell, Esquire

110-11 Queens Blvd.

Forest Hills, N.Y. 11375

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~[illegible]~~ 35 TILLARY ST., RM. 327-A, Borough of Brooklyn, County of Kings, City of New York.

Lynn A. Kurtz

Sworn to before me this

8th day of October 1976

Richard S. Sparks

NOTARY PUBLIC

STATE OF N.Y. 30-3610090

QUALIFIED NASSAU

TERM EXPIRES 3-30 77

NOTARY PUBLIC
STATE OF N.Y. 30-3610090
QUALIFIED NASSAU
TERM EXPIRES 3-30 77

Sir:

You will please take notice that a *of which the within is copy, was this day duly entered in the within entitled action, in the office of the Clerk of this Court.*

Dated, Brooklyn, New York *19*

Yours, etc.,

United States Attorney,

Attorney for

To

Attorney for

Sir:

Please take notice that the within *will be presented for settlement and signature to the Honorable* *at the office of the clerk,*

Borough of *City of New York, on the* *day of* *, 19* *, at* *o'clock in the* *noon, or as soon thereafter as counsel can be heard.*

Dated, Brooklyn, New York *19*

Yours, etc.,

United States Attorney,

Attorney for

To

Attorney for

Court Index No.

GRAND JURY SUBPOENA DUCES TECUM

SERVED UPON

AUTOMATED BREAD DISTRIBUTORS, CORP.

Appellant

BRIEF FOR THE APPELLEE

David G. Trager

United States Attorney,
Attorney for E.D.N.Y.

By: Richard L. Shanley, Special Atty.

Due service of a copy of the within is hereby admitted.

New York, October 8 , 19 76

Attorney for

To

Attorney for

Form No.

FPI—55—6-21-68—20M—2601